U.S. Department of Justice

Immigration and Naturalization Service

FAL

Public Copy

*OFFICE OF ADMINISTRATIVE APPEALS*
*425 Eye Street N.W.*
*ULLB, 3rd Floor*
*Washington, D.C. 20536*

[redacted]

File: [redacted] Office: MIAMI, FLORIDA (TAMPA) Date: 28 NOV 2001

IN RE: Petitioner:
Beneficiary: [redacted]

Application: Petition to Classify Orphan as an Immediate Relative Pursuant to Section 101(b)(1)(F) of the Immigration and Nationality Act, 8 U.S.C. 1101(b)(1)(F)

IN BEHALF OF APPLICANT:

[redacted]

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

**DISCUSSION:** The Director, Miami, Florida, denied the immigrant visa petition and the matter is now before the Associate Commissioner for Examinations on appeal. The director's decision will be withdrawn and the petition will be remanded to the director for entry of a new decision.

The petitioner filed the Petition to Classify Orphan as an Immediate Relative (Form I-600) on May 3, 2001. The petitioner is a 47-year-old married citizen of the United States. The beneficiary is 9 years old at the present time and was born in Nandayal, Andhra Pradesh, India on April 29, 1992. The record indicates that the petitioner and his spouse adopted the beneficiary in India on July 26, 2000.

The director denied the petition after determining that the beneficiary did not meet the statutory definition of "orphan."

On appeal, counsel submits a brief and additional evidence. Counsel asserts that the biological mother, who is the surviving parent, is unable to provide proper care to the beneficiary, consistent with the local standards in India.

Section 101(b)(1)(F) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1101(b)(1)(F), defines orphan in pertinent part as:

> a child, under the age of sixteen at the time a petition is filed in his behalf to accord a classification as an immediate relative under section 201(b), who is an orphan because of the death or disappearance of, abandonment or desertion by, or separation or loss from, both parents, or for whom the sole or surviving parent is incapable of providing the proper care and has in writing irrevocably released the child for emigration and adoption.

The record of proceeding contains the petitioner's home study report, the Form I-600 petition and accompanying documentation, the director's denial letter, and evidence submitted on appeal.

In his June 27, 2001 denial of the petition, the director determined that the beneficiary was not an orphan because:

> The adoption deed states that the natural mother has given her consent specifically to you and your spouse for the adoption of her son. It further states that the natural mother has two children and claims she is unable to care for the two children. No evidence was submitted, other than statements, substantiating that the one surviving parent is unable to provide for the care and support [of] her two children. In addition,

it appears the child was placed with your relative in preparation for the completion of the adoption.

The director noted that that even though the beneficiary has only one surviving parent, the beneficiary was not abandoned because the definition of *abandonment by both parents* found at 8 C.F.R. 204.3(b) prohibits a biological parent from relinquishing a child to a specific adoptive parent or for a specific adoption.

On appeal, counsel states that the biological mother is incapable of providing proper care to the beneficiary and, for this reason, seeks to give the beneficiary up for adoption by the petitioner. Counsel notes that the biological father died in a car accident in July of 2000 and the biological mother is emotionally and financially unable to take care of her two children, one of whom is the beneficiary. Counsel submits a statement from the biological mother's physician who states that the biological mother is suffering from depression and cannot care for her children or attend to her daily tasks. Counsel also submits an affidavit from the biological mother's accountant who states that the biological mother is in debt now that her husband, the sole breadwinner of the family, is deceased. Finally, counsel states that the trauma resulting from the biological father's death caused the biological mother and her children to live with her parents so that the children could be cared for.

Counsel maintains that the evidence shows that the biological mother is unable to provide for the beneficiary's basic needs. As the record is presently constituted, however, the evidence does not support this conclusion. Nevertheless, due to an error by the director in analyzing the facts in the present petition, the case will be remanded to the director for entry of a new decision consistent with the following discussion.

According to section 101(b)(1)(F) of the Act, an orphan may be a child who has either been abandoned by both parents or whose surviving parent is incapable of providing him or her with proper care and has in writing irrevocably released the child for emigration and adoption. The record clearly reflects that the biological father died prior to the filing of the petition; yet, the director cited the definition of *abandonment by both parents*, which is found in 8 C.F.R. 204.3(b), as the basis for the denial.

Where it is established that the beneficiary has only one surviving parent, the definition of *abandonment by both parents* found at 8 C.F.R. 204.3(b) should not be referred to or relied upon in the adjudication of the petition. Rather the definitions *of surviving parent* and *incapable of providing proper care* are the relevant definitions in 8 C.F.R. 204.3(b). These definitions state that:

[redacted]

> *Surviving parent* means the child's living parent when the child's other parent is dead, and the child has not acquired another parent within the meaning of section 101(b)(2) of the Act. In all cases, a surviving parent must be *incapable of providing proper care* as that term is defined in this section.
>
> *Incapable of providing proper care* means that a sole or surviving parent is unable to provide for the child's basic needs, consistent with the local standards of the *foreign sending country*.

Neither definition cited above specifically prohibits a surviving parent from relinquishing or releasing his or her child to a specific individual in preparation for an adoption or for a specific adoption. Therefore, in the present petition, the director's statement that "it appears the child was placed with your relative in preparation for the completion of the adoption" was irrelevant to the determination of whether the beneficiary was eligible for classification as an orphan who has only one surviving parent.

As previously stated, the beneficiary's biological mother is the sole surviving parent who, according to the record, lives in Bangalore, India. The biological mother has two children; the beneficiary and the beneficiary's sister. The physician who is treating the biological mother states that the biological mother is emotionally unable to care for both of her children. Counsel also presents a letter from the biological mother's accountant who states that the biological mother is financially unable to provide for the children's care.

The evidence cited above is insufficient to show that the biological mother is incapable of providing for the beneficiary's basis needs, consistent with the local standards in India.

First, the physician's letter does not provide a comprehensive depiction of the biological mother's medical condition. Although the physician states that the biological mother suffers from depression, the physician does not describe the biological mother's treatment, if any, or provide a prognosis for her condition on both a short-term and long-term basis. Without this type of information, the Service cannot evaluate whether the mother's current depression is a short-term condition related to the recent events of her husband's death, or if her current condition would affect her ability to provide for the beneficiary's basic needs on a long-term basis.

Second, the petitioner does not sufficiently explain why the biological mother is able to care for the beneficiary's sibling, but cannot provide for the beneficiary. Counsel states on appeal that the biological mother's parents, with whom she and her

children are living, agreed to assist the biological mother in raising only one child. However, the biological mother's parents' preference in helping to raise only one grandchild cannot be considered a reasonable basis for finding that the biological mother, herself, cannot provide for the beneficiary's basic needs.

Third and finally, the biological mother's accountant lists the biological mother's yearly expenses, which include clothing, school and book fees for the children, and transportation and medical costs. The accountant does not sufficiently explain how he derived these cost estimates or compare these costs and the biological mother's yearly income against the average Indian national's income and expenditures.

By relying upon the definition of *abandoned by both parents* in denying the petition, the director failed to fully consider whether the beneficiary's surviving parent was incapable of providing the beneficiary with proper care according to the local standards of the foreign-sending country. Accordingly, the director's decision will be withdrawn and the case remanded to him so that he may review the record as it is presently constituted and request any additional evidence deemed necessary to assist him in determining whether the criteria outlined in 8 C.F.R. 204.3(d)(1) have been met. As always in these proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361.

**ORDER:** The petition is remanded to the director for entry of a new decision, which if adverse to the petitioner, is to be certified to the Associate Commissioner for review.